(6)

No. 97-1287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN
Petitioners,
VS.
STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND *AMICI CURIAE* BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Hughes Aircraft Retirees Association ("HARA") and the Hughes Employees Association ("HEA") respectfully move this Court for leave to file the attached Brief as amici curiae in support of the Petition for Writ of Certiorari ("Petition") filed by Petitioners, Hughes Aircraft Company ("Hughes") and Hughes Non-Bargaining Retirement Plan (the "Plan").[1]

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[1] Pursuant to Supreme Court Rule 37.6, this Motion and Brief were authored in their entirety by attorneys at O'Melveny & Myers LLP, counsel for HARA and HEA. HARA and HEA were the only persons or entities who made a monetary contribution to the preparation and submission of this Motion and Brief.

The consent of the attorney for the Petitioners has been obtained and is filed concurrently herewith. The consent of the attorney for the Respondents was requested, but refused.

NATURE OF THE INTEREST OF THE AMICI CURIAE

A. Hughes Employees Association -- HEA was incorporated as a non-profit California corporation in 1953. Membership in HEA is extended to all employees of Hughes and to all Department of Defense employees assigned to work at locations within Hughes' California facilities. HEA receives funding from Hughes to carry out its purposes of promoting social, welfare, educational and recreational activities of Hughes' employees. HEA members (other than Department of Defense employees) are participants in the Plan.

HEA's opposition to the Ninth Circuit's Jacobson decision is hardly unexpected. Judge Norris' dissent refers to the "serious adverse consequences" that the majority's decision will have upon the current participants in the Plan. See Petition at 48a. Either plan termination or the inability to use Plan assets to fund the noncontributory feature of the Plan would work a substantial hardship on HEA's members. For these reasons, HEA opposes the Ninth Circuit's decision in its entirety.

B. Hughes Aircraft Retirees Association -- HARA represents Hughes' retirees. It was formed in 1986 as a non-profit organization by Hughes' retirees. HARA's goals are to provide an educational and social forum for Hughes' retirees and to provide them with an opportunity to participate in group activities and community service. From its initial base of less than 20 members, HARA has grown to a membership of over 900 Hughes' retirees, residing primarily in Southern California,

but also elsewhere. Although HARA is recognized as an organization by Hughes, it is an independent retiree organization operating under its own bylaws and governed by a 26 person volunteer board of directors.

HARA's participation in this Brief may seem surprising because the five Respondents have asserted, and convinced the Ninth Circuit, that the retirees would favor the results in the majority opinion. This is not the case. The HARA Board has thoroughly reviewed this matter and concluded that the Ninth Circuit's opinion will, on balance, make retirees worse off. How HARA reached this conclusion is explained in the Brief.

Because it is important that the Supreme Court approach this case without illusions as to the consequences of this matter on the current employees who participate in the Plan and on retirees under the Plan, amici curiae HEA and HARA move this Court for leave to file the attached Brief.

DATED: March 27, 1998.

Respectfully submitted,
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AMICI CURIAE BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION

NATURE OF THE INTEREST OF THE AMICI CURIAE

Hughes Aircraft Retirees Association ("HARA") and the Hughes Employees Association ("HEA") adopt the statements made in the Motion for Leave to File Brief, immediately preceding this Brief, as the description of the interests of the amici curiae.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN ITS ANALYSIS OF THE RETIREMENT PLAN'S ALLEGED TERMINATION.

A. The Termination Of The Plan And Distribution Of Plan Assets Will Have A Detrimental Effect On HARA And HEA Members.

It is obvious why current employees are severely harmed by a holding that the Plan has been terminated. What may be less obvious, however, is why current retirees, the class supposedly benefited by the Ninth Circuit's decision, will be harmed if the Ninth Circuit's misreading of the law is not remedied. In fact, however, HARA's members are harmed by Respondents' attempt to treat the Plan as terminated as of January 1, 1991 (Complaint ¶ 42, Petition at 141a) and to require immediate distribution of all Plan assets (Complaint ¶ 56, Petition at 143a). While a termination may, at first, appear beneficial to Hughes' retirees, the only persons certain to gain from this outcome are Respondents' lawyers. This portion of the Brief explains why a termination decision harms Hughes' retirees. [While the arguments set forth below apply with equal force to Hughes' active employees, for ease of explanation, this portion of the Brief will refer to HARA and the Hughes' retirees.]

The singular disadvantage of plan termination is that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq., ("ERISA") generally requires that all plan assets be distributed in the form of annuity contracts. ERISA

§ 4041(b)(2)(D), 29 U.S.C. § 1341(b)(3); 29 C.F.R. § 4041.3. This has several consequences:

Although the contributory feature of the Plan generally contains a cost-of-living adjustment (see Plan § 4.13-A, App. B), the Plan provides that, in the event of its termination, cost-of-living increases are only available to participants who have already retired as of the date of termination. See Plan § 4.13-A(c), App. B. The cost-of-living feature would thus be lost for the thousands of persons who retired after 1990.

Second, a termination will cause all retirees to lose the possibility of any future pension increases that might otherwise be financed from the surplus. For example, the Plan's cost-of-living adjustment feature is limited to a 4% annual increase (see Plan § 4.13-A, App. B). The only source of protection for inflation increases in excess of 4% would be in the form of ad hoc amendments by Hughes financed from the surplus. But no such surplus will exist if all plan assets are distributed.

There is an even more fundamental problem. The distribution of annuity contracts on plan termination relieves the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency that otherwise guarantees benefits, from what otherwise would be its obligation to stand behind Hughes' pension promises. PBGC Op. No. 91-1 ("the statute does not authorize PBGC to guarantee benefits distributed in the form of irrevocable annuity contracts from insurance companies."), 1991 Westlaw 80739 at *1 (P.B.G.C.), Pens. Plan Guide (CCH) ¶ 23,824. In light of the well-known insolvencies of Executive Life Insurance Company and Mutual Benefit Life Insurance Company (both of which were highly rated until shortly before their insolvencies), HARA understandably prefers the greater

safety of an unterminated plan with PBGC protection. This provides both the safety margin of today's surplus and, if the plan is later terminated, a federal-agency guarantee.

The HARA Board carefully considered the possibility that the decreased security and loss of potential pension increases would be offset by Respondents' hoped-for increase in pension benefits upon plan termination. The possibility of any such increase, however, may prove illusory.

For example, while Respondents assert that the entire surplus belongs to them, Hughes will not agree. Using Respondents' own estimates of employee and employer contributions (Complaint ¶ 21, Petition at 135a-136a), it would appear that at least 60 percent of the surplus could be claimed by Hughes, leaving only 40 percent available to be split between Hughes' retirees and employees.[2] HARA further estimates that, based on the 1995 actuarial report for the Plan by the independent actuarial firm of Towers Perrin, retirees would be entitled to about 70 percent of the surplus not claimed by Hughes, and active employees would be entitled to the remaining 30 percent of the surplus not claimed by Hughes. (This 70/30

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[2] ERISA generally provides that any available surplus is allocated between the value of employer and employee contributions. See ERISA § 4044(d), 29 U.S.C. §1344(d). HARA developed its estimates of these two amounts by increasing the contributions set forth in Complaint ¶ 21 (Petition at 135a-136a) by eight percent interest and comparing the total value of employer and employee contributions as of December 31, 1990. This inexact method is, of course, no substitute for the actual calculations that would be required in order to divide the surplus. Nevertheless, it was necessary for HARA to undertake some type of estimating process to assess the impact of Jacobson on its members.

split is based on the relative value of benefits allocable to each two groups.) As a result, the $1.2 billion surplus at December 31, 1990 (Complaint ¶ 23, Petition at 136a) may only result in $336 million being available for retirees (70% of 40% of $1.2 billion equals $336 million) -- an increase far less valuable to HARA than the security for benefits provided by the surplus.

What has not been mentioned in the lawsuit at this point, as it could not be at the pleading stage, is the fact that the Department of Defense, which has been Hughes' largest customer for many of the years in question, can be expected to assert a claim to a substantial portion of any pension surplus, as it generally does when a company that has derived revenue from government contracts terminates an overfunded pension plan.[3] Although the effect of such a claim is uncertain at this time, it could result in a further reduction of surplus.[4]

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[3] 48 C.F.R. § 31.205-6(j)(4) provides in pertinent part:

> Termination of defined benefit pension plans. When excess or surplus assets revert to the contractor as a result of termination of a defined benefit pension plan, or such assets are constructively received by it for any reason, the contractor shall make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn....

[4] Exactly how the regulations governing the allowance of pension costs in government contracts apply will vary depending on the nature of each individual contract. Moreover, the way any such claim would be treated in a case like this one, where a court rules that a termination occurred (rather than a situation where a company voluntarily terminates its plan to recover surplus) is unknown. Therefore, it is difficult to say exactly how any such claim would affect the size of the plan surplus. Nevertheless, we note that government

(continued...)

In sum, the 1995 actuarial report by Towers Perrin states that the present value of retirement benefits at that time was $2.55 billion. When one measures this amount against the portion of the surplus that Hughes' retirees might actually receive, HARA concludes that the potential benefit increase might amount to no more than 5 or 10 percent and, for the reasons described above, might be much less. This potential increase is not worth giving up the additional security provided by a PBGC guarantee, possible future ad hoc pension increases similar to those Hughes has granted in the past, and, for some retirees, the promise of cost-of-living pension increases.

B. The Ninth Circuit's Opinion Is Wrong.

HARA and HEA submit that, as a matter of law, no plan termination has occurred. In this regard, HARA and HEA adopt and fully agree with the arguments in Part III of the Petition for Writ of Certiorari ("Petition").

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[4](...continued)
contractors generally may only include as a pension cost the cost of pension benefits as provided for in the benefit plan that is in effect at the time of the contract. 48 C.F.R. § 9904.412-50(b)(5) ("Pension cost shall be based on provisions of existing pension plans. . . ."); 48 C.F.R. § 9904.412-60(b)(3) ("in calculating pension costs, the contractor may not assume future benefits greater than that currently required by the plan"). This could potentially allow the government to claim the whole surplus to the extent it exceeds the benefits provided by the plan formula that existed at the time of the government contracts.

II. THE PLAN HAS BEEN AND REMAINS ONE PLAN.

In their Petition, Petitioners note that the Ninth Circuit also erred in finding that the addition of the non-contributory benefit structure to the existing Plan on January 1, 1991, created two distinct plans, even though all benefits continue to be paid from a single trust fund. See Petition at 20 n.6. HEA supports, and herein more fully develops, the argument that the Plan constitutes one plan -- both before and after the January 1, 1991 amendment -- within the meaning of ERISA.

Respondents' First, Second, Third, and Fifth Causes of Action fundamentally rest on one erroneous legal conclusion -- that two separate plans were created as of January 1, 1991. Based on this mistaken underpinning, Respondents then allege that the use of the assets in what they call the Contributory Plan to fund benefits under what they call the Non-Contributory Plan violates ERISA.[5] In each Cause of Action, however,

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[5] Specifically, Respondents allege violations of ERISA §§ 403(c)(1), 404(a)(1)(A)&(B), 203(a), and 406(a)(1)(D). 29 U.S.C. §§ 1103(c)(1), 1104(a)(1)(A)&(B), 1053(a), and 1106(a)(1)(D). These sections provide, respectively, that: (1) plan assets cannot inure to the benefit of any employer; (2) a fiduciary must act for the exclusive purpose of providing benefits to participants and their beneficiaries and with the care, skill, prudence, and diligence of a prudent person; (3) an employee must be 100 percent vested in the benefits attributable to his or her contributions; and (4) plan assets cannot be transferred to or used by or for the benefit of a party in interest.

Respondents' allegation that Hughes benefited by the amendment rests on the notion that the Plan is really two plans, so that the alleged transfer of plan assets to the Non-Contributory Plan
(continued...)

Respondents' linchpin assumption -- which is legally untenable -- is that two plans now exist.

Section 1.01 of the Trust obligates the Trustee to make payments from the Trust Fund in accord with trust and plan provisions. See App. A.[6] No provision of the Plan or the Trust requires or provides for separate segregation of assets attributable to the contributory feature and the non-contributory

[5](...continued)
represents the inurement of plan assets to the benefit of the employer (the § 403(c)(1) cause of action) and represents the transfer to, or use by or for, the benefit of a party in interest of plan assets (the § 406(a)(1)(D) cause of action). This same alleged transfer also is asserted to violate ERISA's fiduciary-duty rules (the § 404(a)(1)(A)&(B) cause of action) and to violate § 203(a) because it results in a potential forfeiture of benefits attributable to employee contributions.

Respondents' claims that Hughes benefited from the Plan amendment contrast with Lockheed Corp. v. Spink, ___ U.S. ___, 116 S. Ct. 1783 (1996). Respondents do not allege, for instance, that Hughes received anything in return from Plan participants in exchange for the Plan amendment at issue. In Spink, by contrast, the participant's ability to receive a higher retirement benefit was conditioned upon his release of any employment-related claims against the employer. Thus, Spink alleged that Lockheed benefited directly from the plan amendment.

[6] For the Court's convenience, Appendix A contains Section 1.01 of the Trust Agreement pursuant to Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan, which is properly before the Court at pages 73-75 of Appellants' Excerpts of Record. Similarly, Appendix B contains Section 4.13-A, Cost of Living Adjustment, Hughes Non-Bargaining Retirement Plan, which is properly before the Court at page 339 of Appellants' Excerpts of Record.

feature. Thus, all of the assets of the Trust are available to pay any claim arising under the Plan.

As a matter of law, therefore, there was only, and remains only, one Plan because (1) it is undisputed that all assets under the Trust are available to pay benefits, and (2) the exclusive test for determining how many plans exist under ERISA is the availability of Trust assets to pay Plan benefits. Under these circumstances, the Department of Treasury, the Department of Labor, and the PBGC uniformly agree that only one plan exists.

The Treasury Regulations at 26 C.F.R. § 1.414(l)-1(b)(1) are dispositive of the single plan versus multiple plan question.[7] Treasury Regulation § 1.414(l)-1(b)(1) defines a single plan by stating:

> [A] plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. A plan will not fail to be a single plan merely because . . . the plan has several distinct benefit structures which apply either to the same or different participants.

This same Treasury Department regulation also determines when a single plan exists for purposes of Title I of

[7] 26 U.S.C. § 414(l) contains the rules concerning the circumstances under which tax-qualified plans (i.e., plans described in 26 U.S.C. § 401(a)) can merge, split, or transfer plan assets. A necessary component of this statutory directive is a determination of how many plans are involved.

ERISA, 29 U.S.C. §§ 1001-1191c. See Malia v. General Electric, 23 F.3d 828, 832 n.4 (3d Cir.), cert. denied, 513 U.S. 956 (1994).[8] Respondents' First, Second, Third, and Fifth Causes of Action all allege violations of statutes that comprise part of Title I of ERISA.

Thus, for both tax-qualification and ERISA matters, the Plan clearly meets the Treasury Department's definition of a "single plan." All of the Plan's assets "are available to pay benefits to employees who are covered" by the Plan. Moreover, according to the Treasury Department's regulations, simply because the Plan "has several distinct benefit structures" does not cause the Plan not to be a single plan. Therefore, the contributory and non-contributory features of the Plan simply are two features of a single plan.

Regulations issued by the Department of Labor confirm that the creation of differing plan features does not result in the

[8] The ERISA Reorganization Plan establishes that this definition applies both to the tax-qualification rules found in the Internal Revenue Code and to the substantive provisions of ERISA. See Reorganization Plan No. 4 of 1978, *reprinted in* 1978 U.S.C.C.A.N. 9815 (the "ERISA Reorganization Plan"). Many of the provisions of ERISA found in the Labor Code, i.e., 29 U.S.C. §§ 1001 et. seq. also are contained in the Internal Revenue Code. The ERISA Reorganization Plan allocates regulatory authority between the Secretaries of Treasury and Labor. Section 101(a) of the ERISA Reorganization Plan transfers to the Secretary of Treasury all authority to issue regulations, rulings, opinions, variances and waivers under Parts 2 and 3 of subtitle (b) ERISA § 208, 29 U.S.C. § 1058, which contains language essentially identical to 26 U.S.C. § 414(l), is found in Part 2 of subtitle (b) of Title I. Accordingly, Treas. Reg. § 1.414(l)-1 is applicable to Title I of ERISA. See Malia v. General Electric, 23 F.3d 828, 832 n.4 (3d Cir.), cert. denied, 513 U.S. 956 (1994).

creation of separate plans. For instance, ERISA § 102, 29 U.S.C. § 1022, requires that summary plan descriptions be proposed for employee benefit plans. The regulations governing summary plan descriptions clearly contemplate the inclusion in one plan of different benefit features. The Department of Labor's regulations provide in pertinent part:

> In some cases an employee benefit plan may provide different benefits for various classes of participants and beneficiaries. For example, a plan amendment altering benefits may apply to only those participants who are employees of an employer when the amendment is adopted and to employees who later become participants, but not to participants who no longer are employees when the amendment is adopted. (See § 2520.104b-4.) Similarly, a plan may provide for different benefits for participants employed at different plants of the employer, or for different classes of participants in the same plant. . . .

29 C.F.R. § 2520.201-4 (emphasis added).

That the determination of how many plans are involved hinges on the availability of Trust assets is confirmed by the fact that the third administrative agency concerned with ERISA, the PBGC, also has adopted the definition of "plan" from ERISA Title I. Specifically, the relevant PBGC regulations (29 C.F.R. § 4001.2) refer to the definition of a defined benefit plan in Title I of ERISA at ERISA § 3(35), 29 U.S.C. § 1002(35). Since Treasury Regulation § 1.414(l)-1 applies to Title I (see supra n.7), the PBGC's definition of "plan" also compels the conclusion that a single plan exists.

This approach to the determination of when a single plan exists is consistent with the Supreme Court's direction that courts look to ordinary trust law for aid in construing terms in ERISA. See Varity Corp. v. Howe, 516 U.S. 489 (1996); Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989). Traditional trust law has never required that a separate trust be established for each different sort of benefit promised to beneficiaries. For example, it is commonplace for a family trust to provide a life estate in property to one beneficiary, a remainder interest to another beneficiary, and an income stream for support to yet another beneficiary. Similarly, traditional trusts frequently provide different benefits to different classes of beneficiaries. Such a structure in no way suggests that separate trusts are created. See II Fratcher, Scott on Trusts § 113 ("The most usual type of trust . . . is one in which there are two or more beneficiaries entitled to the enjoyment of the trust property in succession; as, for example, where it is the duty of the trustee to pay the income to a beneficiary for life, and on his death to convey the trust property to other beneficiaries."); see also 1 Restatement of Trusts 2d § 113, comment b ("The interests of several beneficiaries may be enjoyable simultaneously or successively").

In sum, HEA believes that there is much logic in this approach to determining whether one or multiple plans are involved. Because of a desire to change benefit structures over time or to provide different benefits for different corporate operations, it is a common fact of corporate life that large plans have nonuniform benefit structures. To treat any such difference as a separate plan would lead to hopeless complexities under ERISA because the ERISA reporting and disclosure, funding, and fiduciary-responsibility requirements all are defined on a plan-by-plan basis.

In this case, therefore, one pension plan exists. The suggestion of the Ninth Circuit that, at least under certain circumstances, multiple plans exist for purposes of ERISA even when all trust assets are available to pay all benefits would spread confusion throughout the appellate circuits and is inconsistent with the existing case law and regulations. Both employers and employees would be at sea as to what new rules would apply.

CONCLUSION

For the foregoing reasons, Hughes Aircraft Retirees Association and Hughes Employees Association respectfully submit that this case presents a substantial federal question for this Court's review, that the decision below conflicts with this Court's holding in Lockheed v. Spink, ___ U.S. ___, 116 S. Ct. 1783 (1996), and with other circuit courts' authority, and that, accordingly, this Court should grant the Petition for Writ of Certiorari, and either summarily reverse the judgment below or set the case for plenary review.

DATED: March 27, 1998.

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APPENDIX

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APPENDIX A

SECTION 1.01 OF THE TRUST AGREEMENT PURSUANT TO HUGHES NON-BARGAINING RETIREMENT PLAN AND HUGHES BARGAINING RETIREMENT PLAN

Section 1.01 of the Trust Agreement, as restated in the Sixth Amendment to the Trust Agreement, states:

> It shall be the duty of the Trustee to receive funds for and to hold the Trust Fund (as defined below); to manage, invest, and reinvest the Trust Fund, except as provided in Section 1.03(d); to collect and hold the increase, earnings, and profits thereon; and to make payments from the Trust Fund; all as herein and in the Plan provided. "Trust Fund" herein shall mean all cash and other property contributed, paid or delivered to the Trustee hereunder, all investments made therewith and proceeds thereof and all earnings and profits thereon, less payments, transfers or other distributions which, at the time of reference, shall have been made by the Trustee, as authorized herein. The Trust Fund shall include all evidences of ownership, interest or participation in an Investment Vehicle, but shall not, solely by reason of the Trust Fund's investment therein, be deemed to include any assets of such Investment Vehicle.

APPENDIX B

SECTION 4.13-A, COST OF LIVING ADJUSTMENT, HUGHES NON-BARGAINING RETIREMENT PLAN

Section 4.13-A of the Hughes Non-Bargaining Retirement Plan, entitled "Cost of Living Adjustment," states:

> (a) The monthly Benefit payable under Section 4.2-A(a)(i) of the Normal Retirement Benefit, 4.7-A(a)(i) of the Early Retirement Benefit or 4.9-A(a)(i) of the Late Retirement Benefit or in respect of a Participant during any Plan Year (the "subject Plan Year") after the first Plan Year in which monthly Benefits were so payable shall be adjusted by multiplying the monthly Benefit so payable during the Plan Year immediately preceding the subject Plan Year (after applying the Cost of Living Adjustment to such preceding Plan Year) by a factor (not over 1.040 and not under 0.960) computed to at least three decimal places, determined by dividing:
>
> > (i) the United States Bureau of Labor Statistics Consumer Price Index (All Urban Consumers, all items, United States city average, 1967 = 100) as revised, for the September next before the subject Plan Year
>
> > by

(ii) such Index for the September of the second year before the subject Plan Year.

(b) Notwithstanding the provisions of subsection (a), the adjustment provided in such subsection shall not result in a monthly Benefit less than the monthly Benefit initially payable to or in respect of the Participant.

(c) If the Plan is terminated under Section 6.1, no further adjustments shall be made under this Section, except as to Former Participants who had retired under a Normal Retirement Benefit, Early Retirement on or after his fifty-fifth (55th) birthday or Late Retirement Benefit (but not if his Separation from the Service was prior to being Vested) on or prior to the date of such termination.

(d) No adjustment shall be made under this Section to a Benefit payment payable in a lump sum on the death of a Participant as described in Section 4.2-A(a)(ii) of the Normal Retirement Benefit.